Again although he alleges he paid $393.85 he stated he had no receipts for some of the sums which made up that figure. But he had acknowledgments and produced registered post receipts for others. He admitted that the $3,000 mentioned in the promissory note was a sum paid in compromise of a debt for $8,600 which he owed K. Mohamed Sedik & Co. It seems unlikely that K. Mohamed Sedik & Co. would accept a further compromise of $500, payable in various sums over a period of 5 months.

At the trial he failed to prove that he had paid the $393.85 as alleged. There were only documents to show payment of $245 off, and $250 is what he should have paid by the 12th April, 1933, if his story were true.

It is quite possible that there may have been some modification of the agreement specified in the note but if so it was a collateral arrangement the terms of which are not proved, and which came to nothing.

It is clear that Plaintiff was holder in due course. There was no defect in his title, Bills of Exchange Act, 1882, Section 36 (see *Chalmers* Bills of Exchange 10th Edition, p. 140).

The Defendant has failed to discharge the onus which lay on him and there must be judgment for the Plaintiffs for $3,000, the full amount of the promissory note with costs.

Judgment for Plaintiffs accordingly.

Solicitors for Plaintiff—*Mallal & Namazie.*
Solicitor for Defendant—*S. C. Goho.*

[ORIGINAL CIVIL JURISDICTION]
WHITLEY, J.

April 6, 1934.

KOH CHOOI PENG (f) ..... Plaintiff.

vs.

CHUNG KOK SANG & ORS.....Defendants.

[PENANG SUIT No. 499 of 1932]

Practice—Exclusion of Counterclaim—Discretion of the Court—Civil Procedure Code, S.278.

Where a counterclaim, by reason of its involving the addition of parties to the suit and overloading the suit with numerous cross-issues can more conveniently be disposed of in an independent action, the Court in its discretion may exeluded such counterclaim.

Motion by the plaintiff to exclude under Section 278 of the Civil Procedure Code a counterclaim filed by the 5th to 12th defendants.

The following statement of facts is taken in substance from the Judgment of Whitley, J., below.

The present action is an administration suit brought by the plaintiff as legal personal representative of and administratrix of the estates of two persons entitled to shares of the income of certain property under the Will of Chung Ah Quee, deceased, against the first four defendants as the present trustees of that Will. The fifth to twelfth defendants inclusive (who have filed the counterclaim) were subsequently joined as parties on their own application. Their only interest is in the corpus of the estate.

The Testator died in 1901 and the Will and the administration of the Estate have been the subject of much litigation.

For the purposes of the present application the first material date is 20th December, 1921, when judgment was given in Suit No. 217 of 1920 ordering accounts as from the year 1908 on the footing of wilful default. Accounts were taken up to 1921 and, as a result of a compromise, the claims of all parties including the plaintiff against the former trustees were, by an Order of the Court of Appeal made in that Suit on 22nd February, 1932, settled and finally disposed of (so far as concerns income from property situate in Penang) up to the 6th April, 1921.

By an Order of the 19th June, 1922, made in the same Suit the Trustees were ordered to file and pass their accounts as from the 6th June, 1922 and to do so thereafter every six months, and accounts of the Penang property were duly filed up to 30th November, 1931 and taken by the Registrar up to 31st May, 1931.

By an Order of the 12th November made in Suit No. 374 of 1924 accounts were ordered to be taken of the receipts and payments in respect of the immoveable property of the Testator in Perak and Hong Kong. These accounts have been filed up to 31st December, 1924, and 30th June, 1927 respectively but have not yet been taken by the Registrar, and no accounts since those dates have been rendered by the defendant trustees.

Hogan for the plaintiff. The plaintiff sues the trustees (Defts. 1—6) for breaches of trust and the relief claimed in the counterclaim is not against the plaintiff but against the defendant trustees and the class of persons entitled to the income is not before the Court.

The application of defendants 5 to 12 (being persons interested in corpus only) to appoint the plaintiff to represent the class of persons entitled to income shows that the counterclaim is not against the plaintiff but the class. The plaintiff cannot be compelled to represent this class and without the class there is no claim against the plaintiff.

The defendants 5 to 12 according to their defence take little interest in the plaintiff's claim but are mainly concerned with the relief claimed in counterclaim to set aside the orders and certificates in Suit No. 217 of 1920. It is embar-

rassing to try the two claims together and the counterclaim would unduly delay the plaintiff's action which was a straightforward action for breaches of trust.

Further upon these defendants' relief by way of counterclaim it was necessary to add as defendants all parties to Suit No. 217 of 1920, in which the orders and certificates were obtained, if it was intended to set them aside. Under the circumstances the Court should exercise the discretion under Section 278 of the Civil Procedure Code and exclude the counterclaim without prejudice to these defendants bringing an independent action.

P. Simpson for the 5th to 12th defendants (plaintiff's by Counterclaim). The plaintiff is entitled to the income, but has had too much in the past and wants too much in the future.

Accounts regarding income will have to be taken in any event in this action, and accounts taken to ascertain the position between income and corpus as prayed by the Counterclaim either in this action or another before the income can be finally divided; therefore the Counterclaim is not embarrasing, and to bring a separate action would occasion unnecessary expense and delay. The question has not yet arisen whether all necessary parties are before the Court and this is a matter for decision at the trial.

Cur. Ad. Vult.

WHITLEY, J.—By this motion the Plaintiff applies under section 278 of the Civil Procedure Code that the Counterclaim filed by the 5th to 12th defendants inclusive be excluded. That section provides that when a defendant sets up a counterclaim, if the plaintiff contends that the claim thereby raised ought not to be disposed of by way of counterclaim but in an independent action the Court may at any time order that such counterclaim be excluded.

The section is taken from the English Order 21 Rule 15, which, as Kay, J. observed in the case of *Gray* v. *Webb*, 21 Ch. Div. 802, gives the Court a wide discretion. This discretion must be exercised judicially and it is necessary to consider carefully the facts of each particular case.

[His Lordship after stating the facts, continued.]

They contend that Suit No. 217 of 1920 was concerned solely with disputes regarding the income of the Estate and the personal liability of the Trustees from time to time and that the class of persons interested only in the corpus was not before the Court and that consequently they, the fifth to twelfth defendants, are not bound by the Order in that Suit dated the 19th June, 1922, or by the Certificates dated the 15th January, 1931, and 23rd November, 1931, made on the taking of the accounts pursuant to that Order. They complain that the effect of that Order and those certificates was to throw upon corpus expenses which ought properly to have been borne by Income. They accordingly claim to have the two Certificates and all Orders in Suit No. 217 of 1920 confirming them set aside.

Thus, the first, and for the purposes of the present motion, most important question raised by the Counterclaim is whether these defendants are bound by the Orders and Certificates made in Suit No. 217 of 1920.

The other relief claimed by the Counterclaim is to a considerable extent incidental. It raises, *inter alia.* questions as to whether costs and expenditure upon repairs and reconstruction should be paid out of Income or Corpus.

The first four defendants are joined as defendants to the Counterclaim as trustees of the Estate.

The plaintiff bases her objection to the Counterclaim upon several grounds and the defendant trustees strongly support her contention that this is not a counterclaim which ought to be or can conveniently be disposed of in this action.

Her first ground is that the only way to set aside a judgment or order is by a Suit and that it should be a separate suit and not a counterclaim.

Mr. Hogan relied upon the case of *Firm of R.M.K.R.M. and Firm of M.R.M.V.L.*, (1926 A.C. 761) in support of this contention, but that case is clearly distinguishable.

A counterclaim is substantially a cross-action and " is to be treated for all purposes for which justice requires it to be so treated as an independent action." (*per* Bowen, L.J., in *Amon* v. *Bobbett*: 22 Q.B.D. 548). I can see no reason why in a proper case a claim to set aside a judgment or order should not be disposed of by way of counterclaim.

The next ground is that the relief claimed by the counterclaim is not against the plaintiff who is suing as legal personal representative of two only of the persons entitled to shares of the income but against the trustees. A Summons taken out by the fifth to twelfth defendants prior to the filing of the motion applied to have the plaintiff or some other person appointed to represent the class of persons entitled to shares in the income. This summons was argued at the same time as the motion and was no doubt designed to meet the objection that the counterclaim seeks no relief against the plaintiff. In considering the motion I will assume that an order has been or will be made as a result of which the class entitled to income is represented

either by the plaintiff or by some other person joined as plaintiff.

It is well-established law that a counterclaim may seek relief either against the plaintiff solely or against the plaintiff and any other persons whether the latter be or be not already parties to the action, but in any case to constitute a counterclaim relief must be claimed against the plaintiff (*Furness* v. *Booth*, 4 C. D. 586).

Further, a defendant can plead a counterclaim against a co-defendant along with the plaintiff (as the defendants are seeking to in the present case) if the counterclaim relates to the subject matter of the plaintiff's claim.

These defendants accordingly have to satisfy me

(a) that the relief which they seek is against *inter alios*, the plaintiff
(b) that the counterclaim relates to the subject matter of the plaintiff's claim.

As regards the first of these points, although the plaintiff does not now sue as the representative of the class entitled to the income, the estates which she represents belong to that class and in any action to set aside orders made in Suit No. 217 of 1920 which benefited that class that class would have to be made defendants. Every member of this class stands to lose if the relief claimed in the counterclaim is granted, so, I think it may be properly said that the counterclaim is directed against that class individually and collectively and accordingly against, *inter alios*, the plaintiff.

As regards the second point—these defendants categorically disclaim any interest in the greater part of the points raised by the Statement of Claim, but their Counterclaim does, I think, indirectly relate to the subject matter of the plaintiff's claim in that if these defendants should succeed in obtaining the relief which they claim in the Counterclaim, the accounts claimed by the plaintiff would have to be taken on a different basis from the one she contends for.

So far then there appears to be no reason why the counterclaim should not be set up in this action. There remains only to be considered the question as to whether the cause of action of these defendants is of such a nature that it cannot be conveniently tried at the same time as the plaintiff's claim; and it is here that it seems to me these defendants are faced with very substantial difficulties. I was referred to a large number of cases in which a counterclaim had either been excluded or not excluded, but none of them was really apposite to the special and very unusual set of facts in the present case. The principle, however, which emerges from the decided cases is clear. A counterclaim should be excluded if it would unduly delay the action, or is embarrassing, or for any other good and sufficient reason cannot be conveniently disposed of by way of counterclaim. *Gray* v. *Webb (supra)* and *Fendall* v. *O'Connell*, 52 L.T. 538.

I am quite satisfied that the claim to set aside the various orders in Suit No. 217 of 1920 can be more conveniently disposed of in an independent action. The present action as it stands without the counterclaim involves the investigation of sixteen distinct allegations of breach of trust and wilful default. The particulars thereof set out in the Statement of Claim fill eight pages. The acts alleged are of the most varied character and the trial must necessarily be long and difficult. But there is no difficulty as to who should be parties or as to where the onus lies. Whether or not the orders in Suit No. 217 of 1920 are set aside the plaintiff in this case is clearly entitled to have these allegations of breach of trust disposed of as speedily as possible and, if she substantiates her allegations, to have an order for accounts. If accounts are to be taken it is obvious that the sooner they are taken the better, and if money is due from the trustees the sooner that is ascertained and payment ordered the better it will be for those entitled.

None of these matters are affected by the question as to whether the orders in Suit No. 217 of 1920 are to be set aside or not. That question only becomes material when the Court comes to determine the amount, if any, which is to be paid out to the plaintiff, which amount must, of course, depend upon which expenses etc. are borne by income and which by corpus. The ascertainment of that amount would have to be postponed until after the determination of the matters raised by the fifth to twelfth defendants. That would be the position if the Counterclaim is excluded and made the subject of a separate action. No hardship would be inflicted upon anybody except the relatively negligible expense of launching the separate action. No delay would be entailed.

What would be the position if the Counterclaim be allowed to stand? There would then be one action in which such diversified questions as breach of trust and setting aside orders in another action would have to be tried together. What is probably a most difficult and highly technical question as to what further persons would have to be made parties would have to be fought out before the trial could proceed. This matter was not argued at length before me, but, *prima facie*, I take it that all the parties in Suit No. 217 of 1920 would have to be made parties to an action to set aside orders made in that Suit. The present suit would become overloaded with parties and cross-issues involving endless argument as to who should open and who have the last word.

I feel reasonably satisfied that the balance of convenience is in favour of excluding the counterclaim.

The 5th to 12th defendants can bring their separate action forthwith, and I can see no reason why all the many questions to be determined should not be disposed of speedily without any overlapping.

I would observe in conclusion that, in my opinion, the legal advisers of the 5th to 12th defendants were fully justified in filing this counterclaim, and it is only because I am strongly impressed by the weight of the arguments put forward by all the other parties urging the inconvenience of seeking to dispose of it in this suit that, in the exercise of my discretionary power, I have come to the conclusion that it should be excluded and made the subject of a separate action.

Order accordingly.

Solicitors for the Plaintiff—*Hogan & Ivens.*

Solicitors for the 1st, 2nd, and 4th Defendants—*Wreford & Thornton.*

Solicitors for the 3rd Defendant—*Logan, Ross & Samuel.*

Solicitors for the 5th to 12th Defendants (inclusive)—*Presgrave & Matthews.*

[ORIGINAL CIVIL JURISDICTION]

WHITLEY, J.

April 20, 1934.

IN RE THE ESTATE OF JAMES MONTAGUE BENT VERMONT DECEASED.

[PENANG ORIGINATING SUMMONS No. 138 of 1933]

Will — construction — residuary bequest of personal estate and effects whatsoever and wheresoever—whether immoveable property included—extent of estate taken by trustees —effect of absolute gift followed by gift over—words of survivorship—whether reference to death of testator or period of distribution.

By his Will a testator appointed two trustees of whom his wife was one. He gave and bequeathed to his wife, *inter alia*, all the residue of his personal estate and effects whatsoever and wheresoever and of what nature and kind or quality soever for her own absolute use and benefit upon trust that she should enjoy certain annuity of not less than £500/- per annum from such properties. He directed the surplus income to be utilised for the payment off of the mortgages then extant and interest thereon. After the death of his wife, he directed that "such properties or monies that may be in hand" might be equally divided between his two named brothers and his nephew, giving the surviving nephews and nieces by his first marriage a prior claim of $1,000 each from such properties or monies. He also provided out of the income derived from his properties a sum for the liberal education of a named beneficiary. At the date of the making of his will the testator's property consisted chiefly of immoveable estate. The testator's personal estate was insufficient to yield an income of £500 per annum. The widow died in 1931. Three of the testator's nephews and nieces by his first marriage had survived him but had predeceased his widow.

Held, on the true construction of the Will, that the testator intended to dispose of all his property and that his real or immoveable estate passed by the Will.

Held further, that the testator's intention was that all his property should (after payment of his funeral and testamentary expenses and legacies and subject to the payment to the widow of the annuity of £500/- and to the allowance for the education of the named beneficiary and to the redemption of mortgages) be enjoyed by his widow during her lifetime and that accordingly she was entitled for life to the whole of the income of his immoveable and moveable properties subject to the payments and allowances mentioned.

Held further, that after the death of the widow a valid trust was created in favour of the testator's named brothers and his nephews and nieces.

Held further, it was clear from the Will read as a whole that the intention was that the whole estate should vest in the present trustees.

Held further, that the gift over on the death of the widow to the surviving nephews and nieces, being preceded by a prior life interest, took effect in favour of those only who survived such prior interest and the word "surviving" was referable to the date of distribution and not the date of testator's death and that accordingly the representatives of the nephews and nieces who had predeceased the widow were not entitled.

James Montague Bent Vermont made his Will dated the 2nd July, 1903, by which after bequathing certain legacies and subject to the payment of his debts funeral expenses he gave to his wife Elizabeth Vermont "all my household goods, monies, furniture, plate, horses, cattle and utensils of household which shall be in about or appertaining to my dwelling houses at the time of my decease, also all the rest residue and remainder of my personal estate and effects whatsoever and wheresoever and of what nature kind or quality soever for her absolute use and benefit upon trust and condition that my wife shall enjoy a certain income from such properties of not less than five hundred pounds sterling (£500/-) per annum over and above her marriage settlement of ten thousand dollars a portion of which is now invested in Richmond Bungalow, Penang Hill. The surplus income of the properties being used to pay off the existing mortgages and interest thereon." (This clause was numbered for convenience as Clause 7).

A later clause numbered for convenience as Clause 11 in the testator's said Will read as follows:—

> "Finally it is my wish and desire that at the demise of my wife that such properties or monies that may be in hand may be equally divided between my brothers Thomas Robert Vermont and Alexandra Septimus Forbes Vermont; the surviving sons and daughters of Philip Jones to have a first claim of one thousand ($1,000.00) each in such residue, they being my much beloved nephews and neices by my first marriage."